

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

In the Matter of the Arbitration Between

Name of Claimant

Edward Gaskins & Bernice L. Van Pelt

94-01883

Name of Respondents

Emanuel & Company
Thomas James Associates, Inc.
Manlio Bastart

REPRESENTATION

For claimants Edward Gaskins ("Gaskins") and Bernice L. Van Pelt ("Van Pelt") (collectively referred to as "claimants") appeared Michael E. Silverman, Esq., Holmdel, New Jersey.

For respondent Thomas James Associates, Inc. ("Thomas James") appeared Peter H. Abdella, Esq. of Harter Secrest & Emery, Rochester, New York.

Respondent Manlio Bastart ("Bastart") appeared pro se.

Respondent Emanuel & Company ("Emanuel") did not appear enter an appearance in this matter.

CASE INFORMATION

Statement of Claim filed: May 16, 1994.

Claimants' Submission Agreement signed on: March 30, 1994.

Statement of Answer filed by Thomas James on: August 3, 1994.

Thomas James' Submission Agreement signed on: August 3, 1994.

Statement of Answer filed by Bastart on: July 29, 1994.

Bastart did not file an executed Submission Agreement with the NASD.

Respondent Emanuel & Company did not file a Statement of Answer or an executed Submission Agreement with the NASD.

HEARING INFORMATION

Hearing Dates/Sessions: April 8, 1996 - Two
Sessions

April 9, 1996 - Two
Sessions

April 22, 1996 - Two
Sessions

The hearings were held at the offices of the National Association of Securities Dealers, Inc. located in New York, New York.

CASE SUMMARY

Claimants alleged that Gaskins, with power of attorney for his aunt, Van Pelt, opened a joint account with Thomas James with the purchase of three municipal bonds. Claimants further alleged that Bastart became their account representative and that he began exercising discretion and purchased and sold securities without prior discussion with them. Claimants also alleged that Bastart sold one of the municipal bonds and purchased in its place 1,000 shares of BPI Environmental Pfd. Class A Convertible ("BPI") and that this was the first of a significant number of transactions which materially deviated from their stated investment objectives. Further, claimants alleged that these transactions were unsuitable not only because of the type of securities purchased, but also because of the frequency of the transactions.

Claimants alleged that, in or about August 1992, Bastart informed Gaskins that he would be working at Emanuel and that claimants' account would be transferred. Claimants further alleged that unsuitable transactions were made at a frenzied pace in their account, which included warrants, options and penny stocks, and that the purchases also created large margin debit balances which caused the account to become leveraged and unduly speculative. Claimants also alleged that approximately 150 purchases and sales were made in their account in approximately eighteen months.

Claimants alleged that respondents made untrue statements and omissions of material fact, upon which they relied on for the purchase and sale of securities. Claimants further alleged that respondents engaged in excessive trading in their account in order to generate commissions without regard for their interests. Claimants also alleged that respondents breached their

fiduciary duty to them by failing to act in good faith and by recommending unsuitable investments for their account.

Claimants alleged that respondents were negligent by failing to exercise the degree of care, skill and competence reasonably expected of professionals in the securities industry. Claimants asserted that respondents falsely and fraudulently made misleading statements of material fact with the intent to defraud and deceive claimants. Claimants further asserted that respondents breached their contract by failing to comply with the terms of the customer agreement.

Thomas James denied that any of the transactions in claimants' account at Thomas James were unsuitable or materially deviated from claimants' stated investment objectives. Thomas James also denied that Bastart purchased and sold securities for claimants' account without first discussing it with claimants. Thomas James maintained that Bastart left its employ on or about August of 1992 and that claimants' account was closed about that time.

In its cross-claim, Thomas James asserted that, if claimants recovered an award against Thomas James, Bastart and Emanuel were liable to Thomas James for all or any part of such award.

Bastart maintained that, prior to any transactions in claimants' account, all pertinent materials pertaining to a recommendation were reviewed by Gaskins. Bastart also maintained that the initial municipal bond transactions in claimants' account were canceled due to nonpayment and that two of the three were reinstated because of his requests to management. Bastart next maintained that, based on claimants' annual income and net worth, Thomas James' management informed him that the selected investments were suitable.

Bastart maintained that no trades were executed in claimants' account without Gaskins' prior consent and understanding and that Gaskins was always informed prior to any action. Bastart also maintained that, with respect to most of the trades made in claimants' account, he did not get paid or no commissions were charged at all. Bastart further maintained that he supplied Gaskins with all pertinent data supplied to him from the firm, issuer and industry sources which he believed to be reliable and that he never guaranteed an investment's accuracy or outcome. In addition, Bastart maintained that he always acted in good faith, fairly and honestly toward claimants and that he acted above and beyond his duties to service their account.

RELIEF REQUESTED

Claimants requested an award jointly and severally against respondents for:

a. Compensatory damages in an amount to be determined at the hearing;

b. Punitive damages of \$250,000.00 to punish respondents for their wrongful conduct and to deter respondents from engaging in such conduct in the future;

c. Disgorgement of commissions and margin interest;

d. Prejudgment interest; and

e. An award of such other and further relief as the arbitrators deem just and equitable together with attorney's fees, costs and disbursements.

Respondent Thomas James requested that the Statement of Claim be dismissed in its entirety and that the panel award respondent its costs.

Respondent Bastart did not specifically request relief.

OTHER ISSUES CONSIDERED & DECIDED

The arbitrators made the following rulings concerning respondent Emanuel who failed to file a Statement of Answer and Submission Agreement and did not appear at the evidentiary hearing conducted in this matter with obtaining any adjournment/postponement thereof:

1. Pursuant to Section 1 of the Code of Arbitration Procedure (the "Code"), the panel found subject matter jurisdiction over this entire controversy.
2. The panel found that Emanuel was a members of the NASD at the time this controversy arose and, consequently, the panel found personal jurisdiction over Emanuel pursuant to Section 12 of the Code.
3. In view of (2) above, the panel found that Emanuel was required to file with the NASD a Statement of Answer and an executed Submission Agreement pursuant to Section 25(b) of the Code.
4. In accordance with Sections 21, 26 and 29 of the Code, the panel found that Emanuel had "due notice" of the hearings conducted in this matter by regular and certified mail. The panel determined to proceed with the hearing without Emanuel,

whose absence was unexcused.

The arbitrators made the following rulings concerning respondent Bastart, who failed to file a Submission Agreement in this matter:

1. Pursuant to Section 1 of the Code of Arbitration Procedure (the "Code"), the panel found subject matter jurisdiction over this entire controversy.
2. The panel found that Bastart was an associated person of a member of the NASD at the time this controversy arose and, therefore, the panel found personal jurisdiction over Bastart pursuant to section 12 of the Code.
3. In view of (2) above, the panel found that Bastart was required to file with the NASD an executed Submission Agreement pursuant to Section 25(b) of the Code.

The parties have agreed that the award in this matter may be executed in counterpart copies or that a handwritten, signed award may be entered. In either case, the parties have agreed to receive conformed copies of the award while the originals remain on file with the NASD.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1. Respondents Thomas James and Bastart be and hereby are jointly and severally liable and shall pay claimants the sum of \$20,000.00, inclusive of interest.
2. Respondents Emanuel and Bastart be and hereby are jointly and severally liable and shall pay claimants the sum of \$45,000.00, inclusive of interest.
3. Respondents Thomas James and Emanuel be and hereby are jointly and severally liable and shall pay claimants the sum of \$950.00 to reimburse them for fees previously paid to the NASD.
4. Claimants' request for attorneys' fees is hereby denied.
5. Claimants' request for punitive damages is hereby denied.

6. All other claims are hereby denied.

FORUM FEES

Pursuant to Section 43(c) of the Code of Arbitration Procedure, the arbitrators have determined that the NASD shall retain the \$200.00 hearing-session deposit submitted by claimants and have assessed the following forum fees:

6 hearing sessions x \$750.00 = \$4,500.00
minus hearing session deposit = \$ 750.00
Total fees outstanding = \$3,750.00

Respondent Thomas James be and hereby is liable and shall pay to the NASD the sum of \$1875.00, representing one-half of the outstanding forum fees.

Respondent Emanuel be and hereby is liable and shall pay to the NASD the sum of \$1875.00., representing one-half of the outstanding forum fees.

Fees are payable to the National Association of Securities Dealers, Inc.

ARBITRATORS' SIGNATURES

/s/ _____
George R. Freund
Chairperson-Public Arbitrator

Allen Kilik, Esq.
Public Arbitrator

Malcolm J. Irving
Industry Arbitrator

Date of Decision: July 10, 1996

I, George R. Freund, do hereby affirm pursuant to Article 7507 of the Civil Practice Law & Rules that I am the individual described herein and who executed this instrument which is my award.

/s/

George R. Freund

ARBITRATORS' SIGNATURES

George R. Freund

Chairperson-Public Arbitrator

/s/

Allen Kilik, Esq.

Public Arbitrator

Malcolm J. Irving

Industry Arbitrator

Date of Decision: July 10, 1996

I, Allen Kilik, Esq., do hereby affirm pursuant to Article 7507 of the Civil Practice Law & Rules that I am the individual described herein and who executed this instrument which is my award.

/s/ _____
Allen Kilik, Esq.
ARBITRATORS' SIGNATURES

George R. Freund
Chairperson-Public Arbitrator

Allen Kilik, Esq.
Public Arbitrator

/s/ _____
Malcolm J. Irving
Industry Arbitrator

Date of Decision: July 10, 1996

I, Malcolm J. Irving, do hereby affirm pursuant to Article 7507 of the Civil Practice Law & Rules that I am the individual described herein and who executed this instrument which is my award.

/s/ _____

Malcolm J. Irving

The following Arbitrator(s) concur(s) with the award:

George R. Freund

Allen Kilik, Esq.

Malcolm J. Irving

The following Arbitrator(s) dissent(s) with the award:

none